UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JOANNE M. WOODS, Individually and as Administratrix of the Estate of KRISTIAN T. WOODS, and as Court-Appointed Guardian of Property of MYDASIA A. WOODS, IZAIAH K. WOODS and MARIYAH A. WOODS,

Civ. No. 13 CV 0798S

Plaintiff,

vs.

REPLY MEMORANDUM

TOWN OF TONAWANDA,
COUNTY OF ERIE,
OFFICER MICHAEL MARCIANO,
OFFICER FLATAU, OFFICER NICHOLAS SALONIKIS,
LT. BAUMGARTNER, OFFICER McNAMARA,
OFFICER MURPHY, LT. McNAMARA,
MICHAEL BOTHAM, OFFICER FRANCO,
OFFICER LEWANDOWSKI, JAMES FRANKLIN,
THOMAS THOMPSON, TIMOTHY HIGGINS,
MARK MARREN, ERIC FINTAK, JOHN GAVIN,
JUSTIN TEDESCO, CHAD MYERS, CESAR BOTELLO, JOHN "JACK" ROBINSON, PHILLIP KUPPLE, DANIEL HARRIS, SGT. ANTHONY LoDESTRO and DEP. HALADAY,

Defendants.

STATEMENT

This Reply Memorandum of Law is submitted in reply to the plaintiff's Memorandum and in further support of the Town Defendants' Motion for Summary Judgment. The facts concerning this motion are fully set forth in the Town Defendants' Local Rule 56 Statement of Material Facts submitted in support of the present motion. Town Defendants respectfully refer the Court to the Statement of Material Facts for a recitation of the relevant facts.

The Town Defendants incorporate and reference the arguments contained in the Reply papers of the County Defendants, as if more fully set forth herein.

ARGUMENT

POINT I

PLAINTIFF DID NOT COMPLY WITH LOCAL RULE 56(a)(2)

Pursuant to Local Rule 56(a)(1):

> Movant's Statement. Upon any motion for summary judgment pursuant to Fed.R.Civ.P. 56, there shall be annexed to the notice of motion a separate, short, and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried. Each such statement must be followed by citation to admissible evidence as required by Fed.R.Civ.P. 56(c)(1)(A). Citations shall identify with specificity the relevant page and paragraph or line number of the evidence cited. Failure to submit such a statement may constitute grounds for denial of the motion.[1]

After the moving party sets forth its statement of undisputed facts, the non-moving party is required to deny each alleged facts that it objects to. Specifically, Local Rule 56(a)(2) states:

> Opposing Statement. The papers opposing a motion for summary judgment **shall include a response to each numbered paragraph in the moving party's statement, in correspondingly numbered paragraphs** and, if necessary, additional paragraphs containing a short and concise statement of additional material facts as to which it is contended there exists a genuine issue to be tried. **Each numbered paragraph in the moving party's statement of material facts may be deemed admitted for purposes of the motion unless it is specifically controverted by a correspondingly numbered paragraph in the opposing statement.**[2]

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1 W.D.N.Y. Local Rule 56(a)(1).

2 W.D.N.Y. Local Rule 56(a)(2) (emphasis added).

In the case before this Court, the plaintiff did not comply with Local Rule 56(a)(2). Specifically, she did not include a response to each numbered paragraph set forth in the Town Defendants' Rule 56 Statement. Instead, the plaintiff set forth some facts in the Declaration of Steven M. Cohen, Esq., but did not set forth which of the Town Defendants' facts she disagreed with. She also did not file a separate Statement of Facts, as required. For these reasons, the Court should deem the facts contained in the Town Defendants' Rule 56 Statement as admitted by plaintiff.[3]

POINT II

PLAINTIFF FAILS TO RAISE AN ISSUE OF FACT WITH RESPECT TO WHETHER OR NOT THE TOWN DEFENDANTS VIOLATED DECEDENT'S CIVIL RIGHTS

As set forth in the Town Defendants' Memorandum of Law dated December 12, 2016, the evidence before this Court is that the Town Defendants were not indifferent to the decedent's medical needs. To make such a claim, a plaintiff must show that decedent had a serious medical condition **and** that said condition was met with deliberate indifference.[4] The requirement that the plaintiff had a serious medical condition is an objective element, whereas the requirement that the condition was met with deliberate indifference is a subjective element.[5] For purposes of brevity, it is respectfully submitted that the Town Defendants have made a prima facie showing that they were not deliberately indifferent to decedent's medical needs; deliberate indifference is akin to

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3 See Glazer v. Formica Corp., 964 F.2d 149, 154 (2d Cir. 1992); see also Singh v. New York State Dep't of Taxation & Fin., 911 F. Supp. 2d 223, 229 n.2 (W.D.N.Y. 2012).

4 Hardy v. City of New York, 732 F. Supp. 2d 112, 128 (E.D.N.Y. 2010).

5 Hunter v. City of New York, 35 F. Supp. 3d 310, 318 (E.D.N.Y. 2014).

recklessness in the criminal context.[6] The decedent was examined by a medically trained paramedic, Michael Botham at Walgreens.[7] The plaintiff has failed to submit any evidence in the form of sworn affidavit or certified medical records to show deliberate indifference.

In addition to the above, the plaintiff fails to acknowledge the extraordinary steps taken by the Town Defendants once the decedent was in police custody. After being informed by the decedent's mother, plaintiff, that he had a psychiatric history and was prescribed Risperdal, the Town Defendants ensured that he was given his prescription.[8] Further, the decedent was placed in a cameraed cell at the police station and was under constant supervision[9], which is a fact that the plaintiff fails to acknowledge. She also fails to acknowledge that the decedent's uncle, a Battalion Chief with the Buffalo Fire Department, was allowed to visit him.[10]

For the foregoing reasons, along with those in the Town Defendants' original Motion papers, it is respectfully submitted that the Town Defendants have made a prima facie showing that they did not delay or deny decedent's access to medical care, did not act with deliberate indifference, and that plaintiff has failed to raise an issue of fact.

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6 Salahuddin v. Goord, 467 F.3d 263, 280 (2d Cir. 2006).

7 See Exhibit N to Town Defendants' Motion for Summary Judgment at pp. 23-27, 29; see also Exhibit DD to Town Defendants' Motion for Summary Judgment.

8 See Exhibit N to Town Defendant's Motion at pp. 41, 44 ; see also Exhibit DD to Town Defendants' Motion for Summary Judgment.

9 See Exhibit R to Town Defendants' Motion at pp. 43-44; see also Exhibit M to Town Defendants' Motion at p. 50.

10 See Exhibit R to Town Defendants' Motion at pp. 34, 39; see also Exhibit M to Town Defendants' Motion at pp. 37, 44-48; see also Exhibit O to Town Defendants' Motion at p. 38.

POINT III

THE TOWN DEFENDANTS HAD PROBABLE CAUSE TO ARREST THE DECEDENT

In her opposition papers the plaintiff argues that the Town Defendants did not have probable cause to arrest the decedent because he lacked the *mens rea* to be found guilty of a crime.[11] In support of her argument, the plaintiff cites Staples v. United States.[12] For the reasons discussed below, Staples does not stand for the position that plaintiff argues.

In Staples, the petitioner was arrested and subsequently indicted and convicted of possessing an automatic firearm. The District Court rejected the petitioner's argument that in order for him to be convicted, it must have been proven that he knew that his firearm met the definition of an automatic weapon within the applicable statute. The Court of Appeals affirmed, and the Supreme Court reversed. The Supreme Court held that the prosecution was required to prove the petitioner had the proper *mens rea* to **convict** him. There is nothing in the opinion stating that the police officers who made the arrest were required to prove that at the time of arrest the petitioner knew he possessed an automatic firearm. The term "probable cause" is not mentioned once in the decision.[13]

As the Court is aware, all that is necessary for the Town Defendants to have arrested decedent at the scene is probable cause that he committed a crime.[14] In other words, given the facts and circumstances at the time of the arrest, would a reasonably prudent person believe that the suspect

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11 See Plaintiff's Memorandum of Law, dated March 13, 2017 at pp. 8-10.

12 511 U.S. 600 (1994).

13 See generally Staples v. United States, 511 U.S. 600 (1994).

14 Beck v. Ohio, 379 U.S. 89, 91 (1964).

committed a crime or was in the process of committing a crime.[15] In the case before this Court, as discussed in the Town Defendants' Memorandum of Law, the Town Defendants had ample probable cause to believe the decedent had committed a crime, and thus their arrest of decedent was constitutionally valid.[16]

POINT IV

DESPITE ARGUMENTS TO THE CONTRARY, THE PLAINTIFF WAS REQUIRED TO SERVE THE INDIVIDUAL TOWN DEFENDANTS

In her Opposition papers, the plaintiff states that she was not required to serve the individual Town Defendants[17] with the Amended Complaint(s), and that said failure to serve is not fatal to her claims.[18] Plaintiff states that "New York Courts have ruled that individual officers served through a County representative and not in their respective individual capacities is not a fatal error to plaintiff's complaint."[19]

Initially, it is brought to the Court's attention that the plaintiff has not cited any case law in support of her argument. Also, there is no evidence before this Court that the individual Town Defendants were served through a County representative; they are not County employees, and therefore, even if such service took place (of which there is no proof) it would be improper with

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15 Id. at 91.

16 See Town Defendants' Memorandum of Law at pp. 17-19.

17 The individual Town Defendants are: Officer Marciano, Officer Flatau, Officer Salonikis, Lt. Baumgartner, Officer McNamara, Officer Murphy, Lt. McNamara, Michael Botham, Officer Franco, and Officer Lewandowski.

18 See Plaintiff's Memorandum of Law at pp. 13-14.

19 Id. at p. 13.

respect to the Town Defendants. If the plaintiff relies on Castro v. City of New York[20], which was cited in her Memorandum of Law against the County Defendants, but not the Town Defendants, that case is distinguishable from the case before this Court.

In Castro, a *pro se* plaintiff made several attempts to serve the defendants, albeit improperly. Because the plaintiff had made good faith efforts to serve the defendants, the Court found good cause for the failure to do so properly.[21] Unlike in Castro, there was no effort to serve the individual Town Defendants, nor does the plaintiff allege that she made good faith efforts to serve them. For these reasons, the Amended Complaint(s) against the individual Town Defendants must be dismissed for lack of service.

Plaintiff also argues that, if the Court finds that improper service took place, that the Court should grant leave to file a Motion to serve the Second Amended Complaint *nunc pro tunc*. First, it is noted that improper service did not take place in the case before this Court. Rather, no service took place, nor was it attempted on the individual Town Defendants. Not only was service not attempted, but the plaintiff also failed to obtain an Amended Summons to add each additional Town Defendant to the action, which was a prerequisite to serving the Town Defendants.[22] Further, the cases cited by plaintiff, Corrado v. New York Unified Court Sys.[23] and Linza v. Colvin[24], are easily

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20 2007 U.S. Dist. LEXIS 77878 (S.D.N.Y. 2007).

21 See generally, Castro, *supra*.

22 See Fed. R. Civ. P. 4(b), (c); see also Exhibit B to Town Defendant's Motion (showing that neither the Amended Complaint, nor Second Amended Complaint had Amended Summonses to add each individual Town Defendant).

23 163 F. Supp. 3d 1 (E.D.N.Y 2016).

24 2016 U.S. Dist. LEXIS 162569 (W.D.N.Y 2016).

distinguishable. In Corrado, the Court granted an extension after the plaintiff failed to serve the defendant within 120 days after filing of the Summons and Complaint. The plaintiff demonstrated that she had attempted service on the defendant and that the defendant evaded service.[25] Similarly, in Linza, the Court granted an extension to serve because plaintiff diligently attempted to serve the defendant.[26]

Here, plaintiff has not made any attempt to serve the individual Town Defendants, and does not argue that she made such attempts. Further, as set forth Corrado and Linza, both cited by plaintiff in her Memorandum of Law, "attorney error does not constitute good cause" for lack of service.[27] Even if the defendant has notice of the claim and is not prejudiced, the plaintiff fails to provide basis for good cause if she does not first diligently attempt service.[28] Because plaintiff has failed to show that she attempted service on the individual Town Defendants, and because it appears that failure to serve was attorney mistake or neglect, the Court should not allow plaintiff to serve the individual Town Defendants almost five (5) years after the underlying incident and four-and-a-half years after the original Complaint was filed.

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25 See generally Corrado, 163 F. Supp. 3d 1 (E.D.N.Y 2016).

26 See generally Linza, 2016 U.S. Dist. LEXIS 162569 (W.D.N.Y 2016).

27 Linza, 2016 U.S. Dist. LEXIS at *4; see also Corrado, 163 F. Supp. 3d at 15 ("The inadvertence, neglect, or mistake of an attorney will not satisfy the good cause standard") (internal citations omitted).

28 Mused v. United States Dep't of Agric. Food & Nutrition Serv., 169 F.R.D. 28, 34 (W.D.N.Y. 1996)

POINT V

DEFENDANTS SUBMITTED EVIDENCE IN ADMISSIBLE FORM WITH RESPECT TO DECEDENT'S DEATH BEING CAUSED BY A SUPERSEDING, INTERVENING CAUSE

Plaintiff argues that the Town Defendants speculate that actions of ECMC personnel were the cause of decedent's death, and further states that the Town Defendants have not tendered evidence in admissible form.[29] For the reasons discussed below, the plaintiff's arguments are meritless and the Town Defendants are entitled to summary judgment.

First, it is brought to the Court's attention that despite plaintiff's argument to the contrary, the issues of proximate cause and foreseeabiltiy can be decided as a matter of law. As stated in Weiss v. Capp, a case cited by plaintiff, "[a]lthough the issue of proximate cause is ordinarily for the jury to resolve, it may nevertheless be determined as a matter of law . . . if the evidence conclusively establishes that there was an intervening act which was so extraordinary or far removed from defendant's conduct as to be unforeseeable."[30] As discussed above, plaintiff has failed to comply with Local Rule 56(a)(2), and the Court should rule that the Town Defendants' facts as set forth in their Rule 56 Statement of Facts are admitted. Taking the facts in the Town Defendants' Rule 56 Statement to be true, this Court should find that the evidence conclusively establishes that the acts of ECMC personnel were a superseding, intervening cause of the decedent's injuries and death for the reasons set forth in the Town Defendants' Motion for Summary Judgment.

Despite plaintiff's argument to the contrary, the Town Defendants have tendered evidence in admissible form so as to support their entitlement to summary judgment. "Medical records . . .

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29 See Plaintiff's Memorandum of Law at pp. 20-21.

30 Weiss v. Capp, 1997 U.S. Dist. LEXIS 5182, *8 (S.D.N.Y. 1997).

can be admissible under Federal Rule of Evidence 803(6), provided they are prepared in the regular course of business, near the time of the occurrence, by a person with knowledge and are properly authenticated."[31] The ECMC records attached to the Town Defendants' Motion for Summary Judgment are admissible because the certification of Richard C. Cleland, Interim CEO of ECMC (by Elizabeth Zivis, Director of Health Information Management) clearly sets forth that the attached records were photocopies of the originals; were made in the regular course of business of the hospital; and were made at the time of the transaction or within a reasonable time thereafter.[32] Further, the records themselves indicate they were being made by medical personnel at the time of decedent's treatment. Therefore, the records are admissible and are properly before this Court.[33]

For the foregoing reasons, the Town Defendants have tendered admissible evidence, and have made a prima facie showing that the actions of ECMC personnel were an intervening and superseding cause of the decedent's injuries and death. Plaintiff has failed to create an issue of fact and the Town Defendants are entitled to Summary Judgment.

CONCLUSION

Based on the foregoing reasons, and those set forth in Town Defendants' Original Motion papers, the Second Amended Complaint, and all cross-claims, should be dismissed against the Town Defendants.

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31 Hodges v. Keane, 886 F. Supp. 352, 356 (S.D.N.Y. 1995); see also Fed. R. Evid. 803(6).

32 See Exhibit AA to Town Defendants' Motion at p. 1.

33 See Jordonne v. Ole Bar & Grill, Inc., 2016 U.S. Dist. LEXIS 56943 (S.D.N.Y. 2016).

Dated: March 29, 2017
Buffalo, New York

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